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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE WILLIAM Q. HAYES)

11 UNITED STATES OF AMERICA,) CASE NO. 08CR0972-WQH
12 Plaintiff,) DATE: April 29, 2008
13 v.) TIME: 10:30 a.m.
14 **RAMON VASQUEZ-CABRALES,**) **DEFENDANT'S RESPONSE AND
15 Defendant.) OPPOSITION TO MATERIAL WITNESS'
16) MOTION FOR VIDEOTAPED
17) DEPOSITIONS**

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND
JOSEPH ORABONA, ASSISTANT UNITED STATES ATTORNEY:

Defendant Ramon Vasquez-Cabralles, by and through his attorneys, Linda Lopez and Federal
Defenders of San Diego, Inc., hereby files the following Defendant's Response and Opposition to Material
Witness' Motion for Videotaped Depositions.

I.

STATEMENT OF FACTS

The following statement of facts and facts further cited in this motion are based primarily on
the probable cause statement. Mr. Vasquez-Cabralles in no way admits the truth of these facts nor their
accuracy as cited in these motions. Further, Mr. Vasquez-Cabralles reserves the right to challenge the truth
and accuracy of these facts in any subsequent pleadings or during any further proceedings.

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1 On March 25, 2008, Supervisory Border Patrol Agent D. Hill observed a Ford F150 truck
 2 driving approximately five miles north of the United states/Mexico international Boundary approximately
 3 twenty miles east of the Tecate, California Port of Entry. According the Agent Hill the truck appeared to be
 4 heavily laden as it bounced excessively.

5 Agent Hill continued following the Ford pick-up westbound on I-8 and allegedly saw a silver
 6 tarp covering the bed of the truck. According to Agent Hill, people were "observed moving under the tarp."
 7 The truck was pulled over and seven individuals were located underneath the tarp while one other individual
 8 was located on the floorboard of the pick-up truck.

9 **II.**

10 **THE MOTION FOR THE MATERIAL WITNESSES' DEPOSITION SHOULD**
BE DENIED BECAUSE THERE IS NO SHOWING OF UNAVAILABILITY
 11 **OF THE WITNESSES AND THE MOTION IS MADE PREMATURELY**

12 Title 18, United States Code § 3144 governs the detention of individuals who may give
 13 testimony material to a criminal proceeding. This section provides that where the witness is not able to meet
 14 the conditions of the bond set by the court and is detained, the court may order the deposition of the witness
 15 where (1) deposition may secure the testimony of the witness and (2) further detention is not necessary to
 16 prevent a failure of justice. See 18 U.S.C. § 3144. In this case, the material witnesses have moved for
 17 videotaped depositions pursuant to 18 U.S.C. § 3144. Although a deposition may secure the material
 18 witnesses' testimony, this Court should order the material witnesses' continued detention in order to protect
 19 Mr. Vasquez-Cabral's constitutional rights. In the alternative, this Court should modify the conditions of
 20 release so that the material witnesses can remain in the United States until this case is resolved.

21 Depositions in criminal cases are generally disfavored for several reasons, including the threat
 22 to the defendant's Sixth Amendment confrontation rights. United States v. Drogoul, 1 F.3d 1546, 1551-52
 23 (11th Cir. 1993). All defendants have the right to confront witnesses against them. See U.S. CONST.
 24 Amend. VI. The Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), reaffirmed this
 25 principle—developed at common law and incorporated into the Confrontation Clause of the
 26 Sixth Amendment by the Framers—that testimonial statements may not be admitted against a defendant
 27 where the defendant has not had the opportunity to cross-examine the declarant. This is true even where the
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1 statements fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of
 2 trustworthiness.” Id. at 60.

3 In Crawford, the Supreme Court noted that the Sixth Amendment was drafted in order to
 4 protect against the “civil-law mode of criminal procedure” and “its use of *ex parte* examinations as evidence
 5 against the accused.” Id. at 50. Such *ex parte* examinations implicate Sixth Amendment concerns because
 6 they are “testimonial” in nature. The “text of the Confrontation Clause reflects this focus” and applies to
 7 “witnesses against the accused - in other words, those who bear testimony.” Id. at 51 (internal quotations
 8 omitted). Although the Supreme Court declined to define “testimonial” evidence, they noted that an “accuser
 9 who makes a formal statement to government officers bears testimony in a sense that a person who makes
 10 a casual remark to an acquaintance does not.” Id. The Confrontation Clause does not permit such testimonial
 11 statements to be admitted at trial against an accused without the constitutionally prescribed method of
 12 determining reliability, *i.e.*, confrontation. Id. at 61-65. In other words, “[w]here testimonial evidence is at
 13 issue . . . the Sixth Amendment demands . . . unavailability [of the declarant] and a prior opportunity for
 14 cross-examination.” Id. at 68.

15 Despite Crawford’s broad prohibition of testimonial statements at trial where the defendant
 16 has no opportunity to confront the witness, there are some situations in which depositions may nonetheless
 17 be taken. In these situations, the burden is on the moving party to establish *exceptional circumstances*
 18 justifying the taking of depositions. Drogoul, 1 F.3d 1546 at 1552 (citing United States v. Fuentes-Galindo,
 19 929 F.2d 1507, 1510 (10th Cir. 1991)). The trial court’s discretion is generally guided by consideration of
 20 certain “critical factors,” such as whether (1) the witness is unavailable to testify at trial; (2) injustice will
 21 result because testimony material to the nonmoving party’s case will be absent; and (3) countervailing factors
 22 render taking the deposition unjust to the nonmoving party. Id. at 1552.

23 When considering this issue, this Court must balance the interests of the government and the
 24 accused, as well as the interests of the material witnesses. Although the material witnesses may have a liberty
 25 interest at stake, that interest is outweighed by Mr. Vasquez-Cabral’s weighty constitutional rights of
 26 confrontation and due process of law. The Confrontation Clause serves several purposes: “(1) ensuring that
 27 witnesses will testify under oath; (2) forcing witnesses to undergo cross-examination; and (3) permitting the
 28 jury to observe the demeanor of witnesses.” United States v. Sines, 761 F.2d 1434, 1441 (9th Cir. 1985).

1 It allows the accused to test the recollection and the conscience of a witness through cross-examination and
 2 allows the jury to observe the process of cross-examination and make an assessment of the witness'
 3 credibility. Maryland v. Craig, 497 U.S. 836, 851 (1989); Ohio v. Roberts, 448 U.S. 56, 63-64 (1980). In
 4 a case such as the one, where the material witness has received the benefit of the Government refraining from
 5 pressing criminal charges in return for her testimony against the accused,¹ it is important that the jury see the
 6 reaction and demeanor of the material witness when they are confronted with questions that will bring out
 7 such facts in order for the jury to decide whether to believe her statements and/or how much credit to give
 8 to her testimony. The jury's ability to make such an assessment would be compromised by a videotaped
 9 deposition because the tape may not preserve subtle reactions of the witnesses under cross-examination that
 10 may favor the accused. The Ninth Circuit recently reaffirmed these important constitutional issues in Yida
 11 v. United States, ___ F.3d ___, 2007 WL 2325143 at *3 (9th Cir, Aug. 16, 2007): "Underlying both the
 12 constitutional principles and the rules of evidence is a preference for live testimony. Live testimony gives
 13 the jury . . . the opportunity to observe the demeanor of the witness while testifying."

14 Moreover, the decision to grant video depositions is governed by Federal Rule of
 15 Criminal Procedure 15(a) which states that a material witness' deposition may be taken only upon a showing
 16 of "exceptional circumstances." United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998). The
 17 material witness here, however, has failed to demonstrate any "exceptional circumstances" justifying the
 18 impingement of Mr. Vasquez-Cabral's Sixth Amendment rights.

19 Furthermore, this Court should consider the unique circumstances faced by the Ninth Circuit
 20 in Torres-Ruiz. Unlike this case, in Torres-Ruiz the material witness' motion for videotape deposition was
 21 unopposed by the defendant. 120 F.3d at 934-35. Perhaps more importantly, in Torres-Ruiz, the defendant
 22 entered a guilty plea less than two weeks after the motion for deposition was made, indicating that the case
 23 was already near disposition when the motion was made. Id. at 936-37. As of now, however, the instant case
 24 stands in a much different procedural posture.

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26 ¹ This Court should be mindful of the fact that the only reason the Government has not charged the
 27 material witnesses with a crime is that the Government seeks to introduce their testimony against the
 28 accused. The material witnesses could have been charged with illegal entry under 8 U.S.C. § 1325, which
 carries a maximum sentence of six (6) months imprisonment. Needless to say, the Government would not
 concern itself with the material witnesses' liberty interests had it, in fact, charged them with this offense.

1 Mr. Vasquez-Cabralas has pled not guilty to all counts of the Indictment. This motion is to
2 be heard before the substantive motion hearing date currently scheduled before Judge Hayes on May 19, 2008.
3 The defense has yet to conduct extensive investigation in this case. In short, it is very early in the case. To
4 require Mr. Vasquez-Cabralas to cross-examine the material witnesses at the current juncture of the
5 proceedings would severely prejudice his future trial rights. Any cross examination of the material witnesses
6 at this point would be at best meaningless, and at worst ineffective and potentially harmful to Mr. Vasquez-
7 Cabralas and his defense. Although there is one material witness free on bond who could possibly be
8 available to give live testimony in this case if needed this will be completely inadequate to protect
9 Mr. Vasquez-Cabralas' Fifth and Sixth Amendments because all of the material witnesses' testimonies are
10 relevant and subject to challenge in the presence of the jury. Each of the material witnesses has a unique story
11 to tell—a story that must be subject to live cross-examination.

12 Finally, if the Court determines that the issue must be addressed at this point in time, the Court
13 can easily resolve the issue by modifying the conditions of release for the material witnesses so that their
14 continued detention would be unnecessary. Conditions of release for material witnesses is governed by
15 18 U.S.C. § 3142. Under this section, “[t]he judicial officer **shall** order the pretrial release of the person on
16 personal recognizance, or upon execution of an unsecured personal appearance bond . . . unless the judicial
17 officer determines that such release will not reasonably assure the appearance of the person as required.”
18 18 U.S.C. § 3142(b). Moreover, the Bail Reform Act states that “[t]he judicial officer may not impose a
19 financial condition that results in the pretrial detention of the person.” 18 U.S.C. § 3142(c)(2). This mandate,
20 combined with the preference for release upon one’s own recognizance, strongly suggests that the proper
21 remedy for the material witness in this case is a motion to modify the terms of her release, not for the
22 draconian remedy of immediately ordering a videotaped deposition and deporting the material witnesses to
23 Mexico.

24 The material witnesses here allege that they cannot secure a personal surety able to post an
25 appearance bond. Nowhere, however, do the material witnesses state their unwillingness to remain in the
26 United States during the pendency of this case. This Court can, and should, modify the material witnesses'
27 bonds to allow them to re-gain her freedom, while at the same time safeguarding Mr. Vasquez-Cabralas' Sixth
28 Amendment rights. The material witnesses have no incentive not to come back to court to testify. The

1 material witnesses are not being charged with a crime. The material witnesses have no incentive to flee the
2 country. Indeed, if the statement of facts in support of the complaint in this case is to be believed, this
3 material witnesses were prepared to pay money to be smuggled illegally into the United States by friends and
4 family members in the United States. Therefore, they obviously wants to remain in this country, fully within
5 the subpoena power of the Court.

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III.

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CONCLUSION

9 For the reasons stated above, Mr. Vasquez-Cabralles respectfully requests that this Court deny
10 the material witnesses' motion for a videotaped deposition.

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Respectfully submitted,

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DATED: April 28, 2008

/s/ Linda Lopez
LINDA LOPEZ
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Vasquez-Cabralles

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CERTIFICATE OF SERVICE

2 Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of
3 her information and belief, and that a copy of the foregoing document has been served this day upon:

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11 | Dated: April 28, 2008

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